85-2066

No.

Supreme Court, U.S.
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CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1985

JOHN DOYLE, BARBARA McCUEN, FRANK MISIANO, KEVIN SWEENEY, GEORGE LYNN, and JOHN CONSIDINE,

Petitioners,

v.

SUFFOLK COUNTY, SUFFOLK COUNTY CIVIL SERVICE COMMISSION, and SUFFOLK COUNTY POLICE DEPARTMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does a complaint alleging that persons were denied public employment as county police officers solely because they passed their 29th birthday state a claim upon which relief can be granted under the Equal Protection clause of the Fourteenth Amendment where the county makes such employment available not only to persons under 29 but also to persons over 40?

The United States Court of Appeals for the Second Circuit answered the question negatively.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	2
Jurisdiction	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	5
Reasons for Granting the Writ	
I The Constitutionality Of The Statutory Maximum Hiring Age Cannot Be Determined On A Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted	8
II The ADEA Has Rendered The Statutory Maximum Hiring Age Irrational And Thus Unconstitutional	19
Conclusion	25
Appendix A Memorandum, Order and Judgment of the United States District Court for the Eastern District of New York	1a

Page

Appendix B
Decision of the United States Court of Appeals for the Second Circuit..... 1b

Appendix C
New York Civil Service Law, § 58..... 1c

TABLE OF AUTHORITIES

CASES: Page

City of Cleburne Tex. v. Cleburne Living Center, ___U.S.___, 105 S.Ct. 3249, 3255 (1985).....10, 12, 22, 23

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957).....17

Hahn v. City of Buffalo, 770 F.2d 12 (2d Cir. 1985).....5, 11, 14, 16, 19

Hishon v. King & Spalding, ___U.S.___, 104 S.Ct. 2229, 2233 (1984).....17, 24

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).....11, 12, 13

Regan v. Time, Inc., ___U.S.___, 104 S.Ct. 3262, 3282 (1984).....21

Shapiro v. Thompson, 394 U.S. 618, 633 (1969).....15

Vance v. Bradley, 440 U.S. 93 (1979)..11, 12, 13, 14

UNITED STATES CONSTITUTION:

Fourteenth Amendment.....10, 12, 13

Page

STATUTES

29 U.S.C. §§ 621-634.....5, 19, 21, 22

New York Civil Law, § 58.....5, 6, 20

OTHER AUTHORITIES:

Wright & Miller, Federal Practice & Procedure, Civil, Section 1234.....18

Federal Rules of Civil Procedure Rule 12(b)(6).....7, 8, 17, 24

NO.

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Respondents,

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TO THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Petitioners, all of whom were 29 or older, but not yet 40, when the litigation commenced, include six of the ten plaintiff-appellants in this action. Though the action was commenced as a class action, the issue of certification of the class was not reached by the district court. The petitioners respectfully pray for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered March 19, 1986.

OPINIONS BELOW

The District Court opinion is not published and is reproduced in Appendix A. The opinion of the Court of Appeals for the Second Circuit is published at 786 F.2d 523 and is reproduced in Appendix B.

JURISDICTION

The court below issued its opinion on March 19, 1986. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT XIV

....No state...shall deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK STATE CIVIL SERVICE LAW

SECTION 58

Section 58 of the New York Civil Service Law requires, inter alia, as a condition for eligibility for appointment as a county police officer, that the candidate be between the ages of twenty and twenty-nine years. The full text of the law is set forth in Appendix C.

STATEMENT OF THE CASE

This case involves the constitutionality of Section 58(1)(a) of the New York Civil Service Law ("Section 58") as partially invalidated by the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. See Hahn v.City of Buffalo, 770 F.2d 12 (2d Cir. 1985).

Section 58 prohibited most New York counties from hiring as county police officers persons who had passed their 29th birthday. Hahn affirmed a judgment after trial that the ADEA invalidated Section 58 insofar as its statutory maximum hiring age requirement applied to persons between the ages of 40 and 70 since youth had not been proven a bona

fide occupational qualification as required by the ADEA.

The petitioners in this petition are men and women who, prior to their 29th birthday, had taken and passed the necessary tests for the position of Suffolk County police officer, but who had passed their 29th birthday before their names were reached on the civil service list resulting from the examination. They were removed from the list because they were too old (over 29) to qualify under Section 58 and too young (under 40) to be protected by the ADEA.

The petitioners challenged their removal from the civil service list solely because of their age as a denial of the equal protection of the law. The district court dismissed the complaint as failing to state a claim upon which relief could be granted,

Federal Rule of Civil Procedure 12(b)(6). The Court of Appeals for the Second Circuit affirmed, despite the absence of any answer or other trial record and the "anomaly" it perceived in the state statutory scheme that permitted the hiring of persons between the ages of twenty and twenty-nine and forty and seventy, but not persons between twenty-nine and thirty-nine. The court held that it was "not irrational for New York to pursue its policy [of not hiring anyone beyond the age 29, as modified by the federal policy barring age discrimination only between ages 40 and 70] to the fullest extent permitted by federal law." (Appendix B, p. 15b).

For the reasons set forth below a writ of certiorari should issue to the Court of Appeals for the Second Circuit to review its decision.

REASONS FOR GRANTING THE WRIT

I

THE CONSTITUTIONALITY OF THE STATUTORY MAXIMUM HIRING AGE CANNOT BE DETERMINED ON A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

(Federal Rule Civil Procedure 12(b)(6))

The trial court dismissed petitioners' constitutional claim on a motion to dismiss for failure to state a claim upon which relief can be granted. (Appendix A). The Court of Appeals noted the lack of a "full trial record on the constitutional issue...or even the affidavits of experts frequently presented at the summary judgment stage of such litigation" (Appendix B, p. 13b), but nevertheless adjudicated and rejected petitioners' constitutional

challenges. Petitioners contend that age is not per se always a rational basis upon which to distinguish between groups of persons. The constitutionality of the use of age as a determinative factor in awarding public employment must be examined in the context of the particular position involved, the age limit utilized, and the factual support adduced by the government for the discrimination. The refusal of the trial court to require respondents to answer petitioners' complaint, plead such justifications as they might for their refusal to hire persons who are 29 or older, and subject such justifications to rebuttal by petitioners and examination by the court was error and requires a reversal and remand for those proceedings to be conducted.

Petitioners do not claim that all maximum hiring ages for public employment are unconstitutional. There is undoubtedly an age beyond which

it would be irrational to hire an otherwise qualified candidate to be a public servant because the reasonably expected period of service of the candidate could not justify the expense of training for the position. In addition, petitioners recognize that discrimination on the basis of age does not require any heightened scrutiny in an equal protection challenge. See, e.g., City of Cleburne, Tex. v. Cleburne Living Center, ___U.S.___, 105 S.Ct. 3249, 3255 (1985). However, as noted in City of Cleburne, the Equal Protection Clause always requires, at a minimum, a "rational means to serve a legitimate end." Id. at 3255. Because respondents have not even been required to answer and plead what legitimate ends they purport to serve by refusing to consider persons over 29 for the position of county police officers, petitioners have not been afforded an opportunity to demonstrate the irrationality of

the use of so young an age as a barrier to public employment as a police officer. Absent pleadings and a trial neither the district court nor the Court of Appeals was in a position to determine whether the imposition of a maximum hiring age of 28 was a rational means to serve such ends as respondents might wish to assert, nor whether those ends were legitimate. Accordingly, the Second Circuit erred in determining, as a matter of law, that the petitioners had not stated a claim upon which relief could be granted.

In the two leading cases supporting the constitutionality of mandatory retirement legislation, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) and Vance v. Bradley, 440 U.S. 93 (1979), this Court upheld the use of age as a determinative characteristic in terminating public em-

ployment, but only after the development of a factual trial record. See Murgia, 427 U.S. at 314 n.7,; Bradley, 440 U.S. at 98-100. Similarly, the challenge to the zoning discrimination in Cleburne Living Center required a detailed examination of the legitimacy of the ends that the government alleged were served by the discrimination and the rationality of the relationship between those ends and the discrimination itself. This too required that a factual record be made in the trial court. Cleburne Living Center, 105 S.Ct. at 3258-3260. No such record exists in this case because the litigation was terminated before the pleading stage was even completed. The "legislative facts" upon which the challenged classification was based remain unstated and thereby insulated from the examination mandated by the Equal Protection Clause. See, e.g., Bradley, 440 U.S. at 111 .

Neither Murgia nor Bradley held that public employment could always be constitutionally conditioned on an age characteristic without regard to the nature of the employment, the nature of the condition (e.g., hiring, limitation on the area of performance, retirement), or the actual age limitation. Indeed, the relationship between advanced age and the legitimate governmental concerns that was found to be rational in those cases simply does not exist in the case of a maximum hiring age of 28. In Murgia this Court held that a mandatory retirement age of 50 for Massachusetts police officers was a rational means of protecting the public by assuring physical preparedness. Murgia, 427 U.S. at 314-315. In Bradley this Court held that a mandatory retirement age of 65 for Foreign Service officers was a rational means of providing for the effect of

declining ability to deal with the special risks incurred in performing the duties of a Foreign Service officer. Bradley, 440 U.S. at 103-109.

"Ability to perform" is not a rational concern of a maximum hiring age requirement where the large majority of the officers already on the police force have passed that age and, of course, continue to perform. This is particularly so where the Court of Appeals has affirmed a decision that age 40 and over is not a bona fide occupational qualification for the position of county police officers in New York. Hahn v. City of Buffalo, 770 F.2d 12 (2d Cir. 1985).

In the case at bar, the Second Circuit recognized that "it is undoubtedly true that many persons above the age of 29 can perform adequately as police officers." (Appendix B, p. 13b). But the Second Circuit nevertheless assumed that fewer

persons over 29 than under 29 would pass the individual physical entrance examinations required of all candidates. Based on this assumption, totally unsupported because there is no record and which there is no indication the legislature even thought of, much less considered, the Second Circuit concluded that fewer persons over 29 would pass the test (presumably the physical tests), and therefore the legislature could decide to save money by not testing any of them. The prohibition against hiring any definable group will undoubtedly save the expense of testing the individual members of that group for their qualifications, but that alone cannot justify discrimination against those individuals. See Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

Similarly, the Second Circuit reasoned that "the legislature was entitled to consider the advantages of limiting appointment to those more likely to remain physically able to perform the duties of a police officer for a substantial period of time." (Appendix B, p. 14b). There is nothing in the empty record to suggest that the overwhelming majority of police officers serve for more than 20 years. New York may not, consistent with the ADEA, retire officers before their 70th birthday.[1] Thus this

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[1] The Second Circuit assumed that New York would wish to retire police officers at age 50 (Appendix B, p. 14b). This is factually untrue as New York has no mandatory retirement age for county police officers. The assumption is not supported by the record and, in any case, mandatory retirement at age 50 would be prohibted by the ADEA. Hahn, supra.

hypothetical rationale would not apply to persons under the age of 50.

The rationality of the myriad of hypothetical justifications for legislative classifications that lawyers (and courts) are so adept at imagining can never be subject to equal protection scrutiny if such challenges are headed off even before the government is required to assert and defend its justifications, as was the case in the challenge for which review is here sought. Because it is not self-evident that a prohibition against the hiring of persons as county police officers who have passed their 29th birthday is rationally related to any legitimate governmental objective, the court below erred in affirming the dismissal of petitioners' complaint under Fed. R. Civ. Pro 12(b)(6). Hishon v. King & Spalding, ___U.S.___, 104 S.Ct. 2229, 2233 (1984), Conley v. Gibson, 355 U.S. 41, 45-46, 78

S.Ct. 99, 102 (1957), Wright & Miller, Federal Practice & Procedure: Civil, § 1234.

II

THE ADEA HAS RENDERED THE STATUTORY MAXIMUM HIRING AGE IRRATIONAL AND THUS UNCONSTTITUTIONAL

In Hahn v. City of Buffalo, the Court of Appeals affirmed that the ADEA prohibits enforcement of New York's statutory maximum hiring age for police officers insofar as it disqualified persons between the ages of 40 and 70. In the case at bar, the Court of Appeals held that its Hahn ruling left the prohibition against hiring police officers between the ages of 29 and 40 intact. It further upheld the constitutionality of Section 58 insofar as it prohibits hiring persons between 29 and 40, but not younger or older persons. The Court of Appeals recognized that a prohibition against hiring

persons who were in their thirties, but not those in their twenties, forties, fifties or sixties, might appear to be "anomalous", but held that it "simply reflect[ed] the New York policy of not hiring anyone beyond age 29, as modified by the federal policy of barring age discrimination only between ages 40 and 70." (Appendix B, p. 15b).

In reaching this conclusion the Court of Appeals determined that the New York legislature would have opted to sever the invalid portion of Section 58 (prohibiting employment to persons over 40) from the remaining portion of the statute[2] (Appendix B, p. 12b). However, the Court of Appeals ignored its constitutional obligation in performing the judicial severance of that invalid portion of that

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[2] Section 58 does not, by its own terms, distinguish between persons over and under 40.

statute. In Regan v. Time, Inc. ___ U.S.___, 104 S.Ct. 3262, 3282 (1984), Justice Brennan, writing with Justice Marshall in partial concurrence and partial dissent, noted:

> in order to uphold a portion of an unconstitutional statute a court must determine not only whether the legislature would have wanted that part to remain in effect, but also whether "what is left" is itself constitutional.

The Court of Appeals failed to examine the constitutionality of what was left, the prohibition against hiring that affected those in their thirties, but not those younger or older. Instead the court simply held that "it is not irrational for New York to pursue its policy to the fullest extent permitted by federal law." (Appendix B, p. 16b). Even if the maximum hiring age restriction would be valid for all persons over 29 in the absence of the ADEA, the prohibition that is left after the opera-

tion of the ADEA is a complete absurdity that simply could not pass equal protection muster on its own.

The respondents have advanced no rationale for a hiring prohibition that applies only to those in their thirties. The court below noted only that New York should be given freedom to discriminate against those 29 and older to the fullest extent of the law, without regard to the rationality of that discrimination. However, whatever unexpressed bias against persons in their thirties may lurk in the hypothetical collective mind of the legislature, such prejudice can no more support a discrimination in public employment than prejudice against the mentally retarded can support the irrational zoning requirements struck down in Cleburne Living Center. In that case, the absence in the record of factual

support for any of the justifications advanced by the city for discrimination was deemed fatal to the discrimination. As in the case at bar, the group against which the discrimination was directed in Cleburne Living Center, shared a characteristic not shared by others. In Cleburne Living Center, the group shared the characteristic of being mentally retarded. In the case at bar the group shares the characteristic of being in their thirties. However, in both cases, the determinative characteristic is a distinction without a difference; one that does not warrant the difference in treatment afforded those groups. Cleburne Living Center, supra., 105 S.Ct. at 3260. At least there is nothing in the record to suggest, much less support, a justification for the difference in treatment other than New York's supposed desire to treat the group differently.

It is not self-evident that a prohibition against the hiring of persons as county police officers in their thirties, that does not apply to younger or older persons, is rationally related to any legitimate governmental objective. Therefore, the Second Circuit erred in affirming the dismissal of the petitioners' complaint under Fed. R. Civ. P. 12(b)(6). Hishon v. King & Spalding, supra.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit to review its decision in Doyle et al. v. Suffolk County et al.

Dated: New York, New York
June 11, 1986.

Respectfully submitted,

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Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

JOHN DOYLE, BARBARA McCUEN, WILLIAM T. MILNE, FRANK MISIANO, JOHN J. PRESTA, and KEVIN SWEENEY for themselves and all persons similarly situated,

Plaintiffs,

-against-

SUFFOLK COUNTY, SUFFOLK COUNTY CIVIL SERVICE COMMISSION, and SUFFOLK COUNTY POLICE DEPARTMENT,

Defendants.

- - - - - - - - - - - - - - - - - -x

CV-83-3195

MEMORANDUM AND ORDER

APPEARANCES:

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ALTIMARI, D.J.:

By Memorandum and Order dated March 19, 1984, this court denied plaintiffs' motion for preliminary injunctive relief finding that although plaintiff would suffer irreparable harm if not permitted to sit for the April 28, 1984 police officer examination they could not establish a sufficient likelihood of success on the merits to warrant the requested equitable relief.

Thereafter, defendants moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing the amended complaint in this action on the grounds that it fails to assert a claim upon which relief can be granted. This court issued a Memorandum and Order, dated June 28, 1985, which held in abeyance defendants' motion to dismiss pending the outcome of an appeal to the Second Circuit Court of Appeals of the decision of the Western District of New York in Hahn v. City of Buffalo, 596 F. Supp. 940 (W.D.N.Y. 1984).

On August 6, 1985, the Second Circuit handed down its decision affirming Chief Judge Curtin's holding that age was not a bona fide occupational qualification, and this that Section 58(1)(a) of the New York Civil service Law is preempted by the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34, at least for those individuals between the ages of 40-70 who are covered by the Act. Hahn v.

City of Buffalo, No. 84-7990, slip. op. 5461 (2d Cir. aug. 6, 1985). The Second circuit did not have before it the question of whether or not N.Y. Civ. Serv. L § 58(1) (McKinney 1983) is violative of the equal protection clause of the United States Constitution since the plaintiff-appellees did not challenge Chief Judge Curtin's ruling of constitutionality on appeal.

Subsequent to the Second Circuit opinion in Hahn, supra, the plaintiffs, by order to show cause, renewed their motion for a preliminary injunction. Plaintiffs sought to enjoin defendants from conduction entry level training classes and from hiring or swearing in new Suffolk County Police Officers until plaintiffs are permitted to participate in the training program, and are considered for appointment without regard to their age.

Thus, this court presently has before it defendants' motion to dismiss as well as plaintiffs' motion for a preliminary injunction; both motions are to be decided in light of he Second Circuit's holding Hahn, supra.

DISCUSSION

Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted is only appropriate when "it appears beyond doubt that the plaintiff can prove no set of facts in support of

his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-6 (1957) (footnote omitted). See, Geisler v. Petrocelli, 616F.2d 636 (2d Cir. 1980); Holmes v. New York city Housing Authority, 398 F.2d (2d Cir. 1968) (quoting Barnes v. Merritt, 376F.2d 8, 11 (5th Cir. 1967).

Plaintiffs challenge the validity of New York Civil Service Law, Section 58(1)(a), which require that candidates for the position of police officer be between the ages of twenty and twenty-nine. Plaintiffs contend that Section 58 is unconstitutional under the equal protection clause of the Fourteenth Amendment and under the New York State Constitution. Plaintiffs also allege that Section 58 conflicts with the New York State Human Rights Law, N.Y. Exec. §§ 291 et seq. (McKinney 1982).

It is well-established proposition that minimum and maximum age limitation on employment eligibility such as that contained in N.Y. Civil Service Law, Section 58(1)(a) (McKinney 1983) are evaluated under the rational basis standard enunciated in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314 (1976). See, also Vance v. Bradley, 440 U.S. 93, 108 (1979). In applying this standard to Section 58, courts consistently have upheld its constitutionality finding that the statute is rationally related to a legitimate government interest. Hahn v. City of Buffalo, 596 F. Supp. 939, 943-44 (W.D.N.Y. 1984) aff'd on other

grounds, No. 84-7990, slip op. 5461 (2d Cir. Aug. 6, 1985); Colon v. city of New York, 535 F. Supp. 1108, 1113-4 (S.D.N.Y. 1982); Sica v. county of Nassau, et al. CV-81-3497, Memorandum and Order (E.D.N.Y. March 9, 1982); See, also Knapp v. Monroe County Civil Service Commission, 77 A.D.2d 817, 437 N.Y.S.2d 136, 136 (4th Dept. 1980) appeal dismissed, 51 N.Y.2d 877, 433 N.Y.S.2d 1030 (1980).

Only one court, the Southern District of New York has declared Section 58 to be unconstitutional. McMahon v. Barclay, 510 F. Supp. 1114 (S.D.N.Y. 1981). In light of Colon, supra, an opinion handed down by the Southern District of New York subsequent to McMahon, and of Hahn, supra, in which Chief Judge Curtin upheld the statute as constitutional after complete discovery and a full trial, it becomes apparent that McMahon is of little precedential value. It is this court's view based upon the holdings and equal protection analysis undertaken in the aforementioned cases, that Section 58(1)(a) is consitutional since rationally related to a legitimate government interest i.e., that of ensuring that the police force is physically able and capable of being trained.

Since plaintiffs' sole federal claim rest on the theory that Section 58(1)(a) is unconstitutional under the equal protection clause of the fourteenth Amendment, plaintiffs; claim must be dismissed under 12(b)(6) of the Federal Rules of Civil Procedure.

Plaintiffs' pendent state claims under the New York State Human Rights Law, N.Y. Exec. §§ 291 et seq. (Mckinney 1982) must be dismissed as well. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Palmer v. Ticcione, 576 F.2d 459, 464 (2d Cir. 1978), cert. denied, 440 U.S. 945 (1979). Plaintiffs have not succeeded in presenting a legally feasible argument in their complaint, and this defendant's motion to dismiss is hereby granted.

It should be noted that the Second Circuit in its recent affirmance of Chief Judge Curtin's opinion in Hahn, No. 84-7990, slip op. 5461, 5465 (2d Cir. Aug. 6, 1985) concluded that Section 58(1)(a) was invalid statewide when applied to individuals agent 40 or older under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 [hereinafter ADEA]. Plaintiffs, however, have not asserted a claim under the ADEA since none of the six individual plaintiffs presently before this court are between the ages of 40 and 70, and thus none have standing to bring an action under the ADEA. 29 U.S.C. § 631(a) ("the prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age."). See, also Hahn v. City of Buffalo, 596 F. Supp. 939, 954 (W.D.N.Y 1984) aff'd, No. 84-7990, slip op. 5461, 5464 (2d Cir. Aug. 6, 1984); Sica v. County of Nassau, et al., No. CV-81-3497, Memorandum and Order, at 4-5 (E.D.N.Y. March 9, 1982). Plaintiffs have indicated their intent to move for certi-

fication of a class consisting of "all persons who have taken and passed Suffolk County open-competitive examination number 79-5002-110 and who have been or are subject to being eliminated by the defendants from consideration for appointment from the list resulting from that examination as a result of the operation of Section 58." (Complaint, at par. 9). As of this date, plaintiffs have made no formal motion for class certification.

It should also be noted that even if the court were to grant plaintiffs' motion for certification of a class containing individuals over the age of 40, significant difficulties would arise when formulating as appropriate remedy. All six plaintiffs presently before this court took and passed the Suffolk County Civil Service Examination 79-5002-110 administered on November 3, 1979, and were placed on a certified eligibility list. This eligibility list is presently the subject of an action pending before this court, United States v. Suffolk County, No. CV-83-2737 (Altimari, D.J.). In that action, the Department of Justice has alleged that the employment practices of the Suffolk County Police Department are violative of Title VIII of the Civil Rights Act of 1964. This court was informed by defendants' attorneys during oral argument on September 4, 1985, that Suffolk County and the Department of Justice have reached an agreement approving fifty of the appointees on the new list. This delicate balance which has

been struck between the Department of Justice and the County would be disturbed by the appointment of individuals, such as the plaintiffs, named on the now now expired eligibility list.

For all of the foregoing reasons, and upon consideration of all papers submitted and argument offered in support of the motions before this court, defendant's motion to dismiss is hereby granted and plaintiffs' motion for a preliminary injunction is hereby denied.
SO ORDERED.

Dated: Uniondale, New York
September 20, 1985.

/S/_____
Frank X. Altimari
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - x

JOHN DOYLE, BARBARA McCUEN, WILLIAM T. MILNE, FRANK MISIANO, JOHN J. PRESTA, and KEVIN SWEENEY for themselves and all persons similarly situated,

Plaintiffs, JUDGMENT

-against-

SUFFOLK COUNTY, SUFFOLK COUNTY CIVIL SERVICE COMMISSION, and SUFFOLK COUNTY POLICE DEPARTMENT,

Defendants.

- - - - - - - - - - - - - - - - - - x

A Memorandum and Order of Hon. Frank X. Altimari, United States District Judge, having been filed on September 20, 1985, granting defendants' motion to dismiss the action and denying plaintiffs' motion for a preliminary injunction, it is

ORDERED AND ADJUDGED that the plaintiff take nothing of the defendants; that the defendants' motion to dismiss the action is granted; that plaintiffs' motion for a preliminary injunction is denied; and that the

complaint and amended complaint are dismissed.

Dated: Uniondale, New York
September 24, 1985.

ROBERT C. HEINEMANN
Clerk of Court

by: /S/
JOSEPH Di TALIA
Deputy-in-Charge

Appendix B

John DOYLE, Barbara McCuen, William T. Milne, Frank Misiano, John J. Presta, Kevin Sweeney, George Lynn, Frederick Slanovec, Chris Innes, and John Considine, for themselves and for all persons similarly situated, Plaintiffs-Appellants,

v.

SUFFOLK COUNTY, Suffolk County Civil Service Commission, and Suffolk County Police Department, Defendants-Appellees,

and

State of New York, Intervenor-Appellee.

Rolf HETTINGER and Michael J. McConnell, Plaintiffs-Appellees,

v.

NASSAU COUNTY CIVIL SERVICE COMMISSION, Adele Leonard, as Executive Director of the Nassau County Civil Service Commission, Nassau County Police Department and the County of Nassau, Defendants-Appellants,

and

State of New York, Intervenor-Appellant.

Nos. 567, 653, Dockets 85–7782, 85–7820.

United States Court of Appeals, Second Circuit.

Argued Dec. 11, 1985.

Decided March 19, 1986.

Before KAUFMAN, NEWMAN and MINER, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

These two related but unconsolidated appeals present equal protection challenges to enforcement of New York's statutory prohibition against the hiring of police officers who are "more than twenty-nine years of age," N.Y.Civ.Serv.Law § 58(1)(a) (McKinney 1983). The challenges arise in the wake of our prior decision in *Hahn v. City of Buffalo*, 770 F.2d 12 (2d Cir.1985), which affirmed a judgment invalidating section 58(1)(a) as applied to those between the ages of 40 and 70 because age 40 had not been shown to be a bona fide occupational qualification under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634 (1982). Both appeals are from judgments of the District Court for the Eastern District of New York. In No. 85–7782, Judge Frank X. Altimari rejected the federal constitutional challenge in a suit brought against Suffolk County, its Police Department, and its Civil Service Commission. In No. 85–7820, Chief Judge Jack B. Weinstein, apparently misled by imprecise language in *Hahn*, ruled in favor of applicants for the position of police officer in a suit brought against Nassau County, its Police Department and Civil Service Commission, and the Commission's director. For reasons that follow, we reject the constitutional challenge and therefore affirm in the Suffolk County suit and reverse in the Nassau County suit.

Background

Section 58(1)(a) generally prohibits the appointment of any person as a police officer of a county, city, town, or village who is less than 20 or "more than twenty-nine years of age." The New York courts have interpreted the quoted phrase to apply to any person who has had a 29th birthday. *Kuczka v. Clark*, 86 A.D.2d 980, 448 N.Y.S.2d 325 (4th Dep't), *aff'd*, 58 N.Y.2d 738, 459 N.Y.S.2d 28, 445 N.E.2d 204 (1982). The maximum age limit is subject to two exceptions. A person who has had a 29th birthday remains eligible for appointment for whatever period of time was spent on military duty or terminal leave up to a maximum period of six years, but in no event may such extra eligibility extend beyond the person's 35th birthday. N.Y.Civ. Serv.Law § 58(1)(a); N.Y.Mil.Law § 243(10–a) (McKinney Supp.1984); *see Kuczka v. Clark, supra.* In addition, eligibility may be extended until a person's 35th birthday for a police department experiencing a "serious shortage" of police officers because of "aggravated recruitment difficulties." N.Y.Civ.Serv.Law § 58(1)(d)(1–a).

In *Hahn v. City of Buffalo, supra*, applicants for the position of police officer challenged section 58(1)(a) as violative of both the Equal Protection Clause of the Fourteenth Amendment and the ADEA. Chief Judge Curtin rejected the constitutional challenge but found the state provision invalid under the ADEA as to those between the ages of 40 and 70 (*i.e.*, those who have had a 40th but not a 70th birthday), the age

group protected by the ADEA. On appeal, the constitutional ruling was not challenged. *See Hahn v. City of Buffalo, supra*, 770 F.2d at 14. The ADEA ruling was upheld. The majority opinion considered the scope of the judgment entered by Chief Judge Curtin as to age groups and geographic coverage. We noted that the judgment "technically prohibits enforcement of section 58(1)(a) only against applicants aged 40 or older" but that the City of Buffalo agreed not to refuse to hire applicants between ages 29 and 40 if it was found to be barred by the ADEA from hiring those between 40 and 70, *id.* at 14 n. 2.[1] Turning then to the geographic scope of the judgment, we concluded that it applied to police hiring not only in Buffalo but throughout New York State. *Id.* at 14. The result of *Hahn* is that section 58(1)(a) may not be used to prevent any person between the ages of 40 and 70 from being hired as a police officer in New York State because of age.

Against this background, the two cases currently on appeal were decided. In No. 85–7782, six persons who passed the Suffolk County Civil Service examination for police officer were told that they were no longer eligible for consideration for appointment as police officers because they

1. Footnote 2 in *Hahn* described the undertaking by Buffalo as applying to those "between the ages of 30 and 39." Since the representation was obviously intended to fill the gap between those excluded by New York law and those covered by the ADEA, it may be assumed to apply to those who have had a 29th but not a 40th birthday.

had become 29. Their suit was filed as a class action, but no class was ever certified. They challenged their rejection, relying on the Equal Protection Clause of the Fourteenth Amendment and New York constitutional and statutory provisions. On a motion to dismiss under Fed.R.Civ.P. 12(b)(6), Judge Altimari rejected the federal constitutional challenge, concluding that section 58(1)(a) was rationally related to the legitimate state interest of ensuring that the police force is physically able and capable of being trained. With the federal claim failing at the outset of the litigation, the District Judge properly declined to exercise pendent jurisdiction over the state law claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); *Palmer v. Ticcione*, 576 F.2d 459, 464 (2d Cir.1978), *cert. denied*, 440 U.S. 945, 99 S.Ct. 1421, 59 L.Ed.2d 633 (1979).

In No. 85–7820, two persons who passed the Nassau County Civil Service examination for police officer were informed of their ineligibility when they became 29. Their suit, filed only on behalf of themselves, challenged the age 29 ceiling on federal equal protection and due process grounds. Chief Judge Weinstein indicated that he considered the constitutional challenge to be without merit. However, seizing upon the language in *Hahn* that the District Court judgment in that case was "intended to invalidate section 58(1)(a) throughout New York State," 770 F.2d at 14, he concluded that we meant to strike

down the statute as applied to persons of all ages, rather than as applied only to those between 40 and 70, which, as we noted, was the scope of the judgment affirmed in that litigation. The sentence relied on by Chief Judge Weinstein was concerned with the *geographic* scope of the *Hahn* judgment and was not intended to expand the age-group scope of the judgment, which was fixed both by the terms of the judgment and by the terms of the ADEA, which the judgment implemented. Our meaning would have been clearer, however, had we repeated the age-group scope of the decision when discussing the geographic scope. Chief Judge Weinstein's misinterpretation, though far from compelled, is entirely understandable. As a result of his reading of *Hahn*, Chief Judge Weinstein granted summary judgment for the plaintiffs and ordered them appointed to the June 1985 recruit class at the Nassau County Police Academy. He then stayed his order pending this appeal.

Since both cases are suits in which the constitutionality of a state statute affecting the public interest is drawn in question and since it did not appear that the State of New York had been afforded an opportunity to intervene, *see* 28 U.S.C. § 2403(b), we invited the State to intervene while the appeals were pending, *cf. In re Goldrich*, 771 F.2d 28, 29 (2d Cir.1985) (views of New York Attorney General invited and received in lieu of intervention). New York State has elected to intervene, and we have received a brief from the State Attorney General urging affirmance in No. 85–7782 and reversal in No. 85–7820.

Discussion

The threshold issue is whether the actions of Suffolk and Nassau Counties, in eliminating the plaintiffs from consideration for appointment as police officers solely because each had become 29, are an application of section 58(1)(a) or an implementation of an administrative policy of the counties unaided by state statute. That issue must be determined because if the counties are applying their own policy, unaided by state statute, we could turn directly to the constitutionality of the counties' actions without pausing to determine the status and meaning of the state statute in light of its partial invalidation in *Hahn*.

The complaint in each case alleges that the county acted because of the requirements of section 58(1)(a). Though answers were never filed, the correctness of this assertion has never been disputed in the proceedings that occurred in the District Court. At oral argument we asked counsel for the counties if the actions challenged in these cases were based on section 58(1)(a) and have been informed by letter dated December 13, 1985, that the state statute is relied on by both counties.

We must therefore consider how New York courts would interpret section 58(1)(a) in light of its partial invalidation in *Hahn*. They could conclude that the New York legislature, if aware that it could not prohibit hiring, because of age, those between 40 and 70, would either (a) prefer not to set any age maximum for police hiring or (b)

prefer to reject police applicants who have had a 29th birthday but not a 40th birthday and those who have had a 70th birthday. If the legislature would prefer to have the statute applied to the extent not invalidated in *Hahn*, then the constitutionality of the surviving portion of the statute would remain for consideration on this appeal. Neither the statutory nor the constitutional issues arising as a consequence of the partial invalidity of section 58(a)(1) were presented in *Hahn* because the City of Buffalo voluntarily agreed not to reject, on the basis of age, those who had reached 29 but had not reached 40.

Normally, the problem of partial invalidity arises when one discrete provision of a statute is invalidated, creating uncertainty as to whether the legislature would have wished the remaining provisions to remain in effect in the absence of the invalidated provision. *See Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (federal statute); *Westinghouse Electric Corp. v. Tully*, 63 N.Y.2d 191, 481 N.Y.S.2d 55, 470 N.E.2d 853 (1984) (New York statute). On occasion, the issue arises when a single provision is partially invalidated. This can occur in either of two contexts. A provision may be found to be underinclusive, thereby requiring a court to determine whether the legislature, had it known it could not legislate in a limited fashion, would have preferred to have no statute extended to apply to the impermissibly excluded class. *See Soto-Lopez v. New York City Civil Service Commission*, 755 F.2d

266, 280–81 (2d Cir.) (invalidating provision limiting five-point bonus on civil service examinations to veterans who were residents of New York at time of induction and extending bonus to all veterans), *prob. juris. noted*, — U.S. —, 105 S.Ct. 3523, 87 L.Ed.2d 648 (1985); *People v. Liberta*, 64 N.Y.2d 152, 485 N.Y.S.2d 207, 474 N.E.2d 567 (1984) (invalidating exemption from rape and sodomy statutes for married men and for females and extending coverage of criminal statutes to formerly excluded classes).Or, less frequently, a provision may be found to be overinclusive, thereby requiring a court to determine whether the legislature, had it known it could not legislate broadly, would have preferred to have no statute or to have the statute limited to apply to all those except the impermissibly included class. *See Confederated Bands and Tribes of Yakima Indian Nation v. Washington*, 552 F.2d 1332, 1336 (9th Cir.1977) (invalidating provision to the extent that it confers state criminal jurisdiction over Indian lands and declaring invalid remainder of statute conferring civil jurisdiction),[2] rev'd, 439

2. The *Yakima Indian* case involves a complex problem of partial invalidation because the Ninth Circuit encountered a statute that was both over- and underinclusive. The Court initially concluded that the statute denied equal protection because it conferred criminal jurisdiction on fee lands but not on non-fee lands. That ruling precipitated a choice between invalidating the grant of criminal jurisdiction over fee lands or extending such jurisdiction to non-fee lands. The Court chose the former course. Then, having deleted all criminal jurisdiction from the statute, the Court had to decide whether to limit the statute to one granting only civil jurisdiction or to invalidate the entire statute. The Court chose the latter course.

U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979) (upholding exercise of state criminal jurisdiction). Our case falls in this last category, requiring us to decide whether, after the partial invalidation of section 58(1)(a) as applied to those between 40 and 70, the New York legislature would prefer to have the statute's maximum age limit applied to all except those between 40 and 70 or would prefer to abandon a maximum age limit.

The inquiry, in each context, is always said to require a determination of legislative intent, *see People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60, 129 N.E. 202, 207 (1920); *see also Buckley v. Valeo*, *supra*, 424 U.S. at 108, 96 S.Ct. at 677; *Confederated Bands and Tribes of Yakima Indian Nation v. Washington*, *supra*, 552 F.2d at 1336; *People v. Liberta*, *supra*, 64 N.Y.2d at 171, 485 N.Y.S.2d at 218, 474 N.E.2d at 578; *Westinghouse Electric Corp. v. Tully*, *supra*, 63 N.Y.2d at 196, 481 N.Y.S. at 57, 470 N.E.2d at 855, but it is not the traditional inquiry as to what the legislatures intended their broad statutory language to mean when applied to a specific set of facts. Rather, the question is what they would have intended had they foreseen that their statute would be declared partially invalid. We can do no more than make an educated guess, mindful that legislative policy should be given effect unless application of the portion of a statute remaining after partial invalidation yields results that the

legislature seems unlikely to have wanted or if the remaining portion is such a minor fragment of a comprehensive provision as to make it likely that the legislature would prefer either no provision or the opportunity to craft a new one.

[1] There is a presumption that the legislature would prefer the portion remaining after partial invalidation to continue in effect. *See, e.g., Regan v. Time, Inc.*, 468 U.S. 641, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984) (plurality opinion); *Buckley v. Valeo, supra*, 424 U.S. at 108, 96 S.Ct. at 677. That presumption is reenforced with respect to section 58(1)(a) by the broad severability provision contained in N.Y.Civ. Serv.Law § 186 (McKinney 1983). Though section 186 does not in terms apply to the type of partial invalidation that occurred in *Hahn*, where a provision was held invalid as applied to a group within its coverage, as distinguished from the invalidation of an entire provision, sentence, or clause, the thrust of the severability provision evidences a marked preference for maintaining any portion of the civil service law that remains after partial invalidation.

[2] In enacting section 58(1)(a), the New York legislature made clear its preference that those 29 or older should not be appointed police officers, with limited exceptions for veterans of military service and for recruitment emergencies. With the statute invalidated as to those between 40 and 70, we have no doubt that the legislators would still want the maximum age limit applied to bar those who have become

70. It is admittedly a closer question whether they would want to bar, solely because of age, those between 29 and 40. We think they would. Having prohibited the appointment of anyone 29 or older, the legislators would most likely have wished that prohibition to remain effective to the greatest extent possible. The partial invalidation required by the ADEA still leaves section 58(1)(a) applicable to large numbers of potential applicants who have become 29 but not 40. Guided by the presumption of validity and by section 186, we hold that the portion of section 58(1)(a) not invalidated by the ADEA is severable from the invalid portion.

[3] We are thus brought to the constitutional issue of whether the statute as it remains after partial invalidation on ADEA grounds in *Hahn* violates the Equal Protection Clause of the Fourteenth Amendment. The issue has two aspects: whether New York may deny appointment as police officer to the entire class of those who have become 29 and whether it may deny such appointment to the subclasses of those who have become 29 but not become 40 and those who have become 70. The standard, applicable to the entire inquiry, is whether the classifications are "rationally related to furthering a legitimate state interest." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976); *see Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 942, 59 L.Ed.2d 171 (1979). Since that standard was applied in *Murgia* and *Bradley* to pro-

visions ending employment because of age, it must apply to a provision prohibiting the commencement of employment because of age.

Though we lack the full trial record on the constitutional issue developed by Chief Judge Curtin in *Hahn*, *see* 596 F.Supp. 939, 943–44, or even the affidavits of experts frequently presented at the summary judgment stage of such litigation, we think the constitutional claims can be adjudicated and must be rejected. *See Arritt v. Grisell*, 567 F.2d 1267, 1271–72 (4th Cir.1977) (upholding constitutionality of 35-year-old cutoff for policemen). The obvious state interest sought to be advanced by the maximum age provision is the recruitment of police personnel physically able to discharge their duties. Denying appointment to those who have become 29 is rationally related to that interest. Though even age 40 was not shown by the defendants in *Hahn* to be a bona fide occupational qualification for purposes of the ADEA, the Equal Protection Clause mandates no such rigorous inquiry. It is not irrational for the New York legislature to believe that physical abilities to perform the duties of a police officer decline beyond age 29. Even though it is undoubtedly true that many persons above the age of 29 can perform adequately as police officers, the legislature could rationally conclude that individual physical testing of all those 29 and older would yield a proportionately smaller group of qualified candidates than testing of those between 20 and 29. The legisla-

ture could therefore decide that the limited financial resources of the State's communities would be best used if physical testing was undertaken only among the group most likely to yield qualified candidates.

Once that decision was made, some line had to be drawn. Selecting age 29 may seem to approach the limits of rationality when applicants aged 28 are compared to those aged 29, but two considerations must be borne in mind. First, "in a case like this 'perfection is by no means required.'" *Vance v. Bradley, supra*, 440 U.S. at 108, 99 S.Ct. at 948 (quoting *Phillips Chemical Co. v. Dumas School Dist.*, 361 U.S. 376, 385, 80 S.Ct. 474, 480, 4 L.Ed.2d 384 (1960)). Second, the legislature was entitled to consider the advantages of limiting appointment to those more likely to remain physically able to perform the duties of a police officer for a substantial period of time. Since Massachusetts was entitled to conclude in *Murgia* that police officers could be retired mandatorily at age 50, New York is entitled to prohibit appointment beyond age 29 in the hope of benefiting from 20 years of an officer's experience before he reaches 50.

The age-29 limit is not rendered irrational by the exceptions New York has made for veterans and for recruitment emergencies. It is not irrational to adjust slightly a policy on police hiring to accommodate both a competing policy of fairness toward veterans and the reality of recruitment difficulties.

Nor does the age limit become irrational because the ADEA bars the State from

applying its policy to the group between 40 and 70. *See Lamb v. Scripps College*, 627 F.2d 1015 (9th Cir.1980) (upholding state provision permitting mandatory retirement of tenured private college professors between ages 65 and 70, but not those below 65 or 70 and older). Had it foreseen the partial invalidation of the statute in *Hahn*, the legislature would have been entitled to conclude that most applicants for police officer who had reached age 29 would be within the subclass that had reached 29 but not 40. The lawmakers could conclude that they would conserve the resources of the communities by eliminating the need for individual physical testing of large numbers of applicants between 29 and 40, even though the ADEA was found in *Hahn* to require individual testing of the few persons between 40 and 70 who might apply to become police officers.[3] Though it seems odd at first glance to have a state statute that prohibits the hiring of all applicants between 29 and 40 and permits the hiring of qualified applicants between 40 and 70, that apparent anomaly simply reflects the New York policy of not hiring anyone beyond age 29, as modified by the federal

3. *Hahn* invalidated section 58(1)(a) as to those between 40 and 70 in a suit in which the defendants were the New York Civil Service Commission and the City of Buffalo. That ruling resulted in a partial invalidation of the statute throughout the State, 770 F.2d at 14, but left open the possibility that communities, other than Buffalo, could demonstrate that their *local* policies setting maximum age limits on police hiring satisfy the bona fide occupational qualification standard of the ADEA, 29 U.S.C. § 623(f)(1). *See Hahn v. City of Buffalo, supra*, 770 F.2d at 15 n. 3.

policy of barring age discrimination only between ages 40 and 70. It is not irrational for New York to pursue its policy to the fullest extent permitted by federal law. *Cf. Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (upholding against equal protection attack state law enacted in response to federal law). Age classifications that serve legitimate state policies are not unconstitutional because they are somewhat anomalous.

In No. 85–7782, the judgment is affirmed. In No. 85–7820, the judgment is reversed and the cause remanded with directions to enter judgment for the defendants. No costs in either appeal.

Appendix c

New York Civil Service Law
§ 58 (McKinney's)

1. Notwithstanding any other provision of this law or any general, special or local law to the contrary, no person shall be eligible for provisional or permanent appointment in the competitive class of the civil service as a police officer of the capital police force of the state office of general services after June first, nineteen hundred seventy-eight, or as a police officer of any police force, or police department of any county, city, town, village, housing authority or police district unless he shall satisfy the following basic requirements:

(a) He is not less than twenty nor more than twenty-nine years of age, provided, however, that the time spend on military duty or on terminal leave, not exceeding a total of six years, shall be subtracted from the age of any applicant who has passed his twenty-ninth birthday as provided in subdivision ten-a of section two hundred forty-three of the military law, and provided further, however, that prior to June thirtieth, nineteen hundred seventy-two, the maximum qualifying age provided hereunder shall be deter-

mined as of the date when the applicant takes the written examination;

(b) he is a high school graduate or a holder of a high school equivalency diploma issued by an education department of any of the states of the United States or a holder of a comparable diploma issued by any commonwealth, territory or possession of the United States or by the Canal Zone or a holder of a report from the United States armed forces certifying his successful completion of the tests of general educational development, high school level.

(c) he satisfies the height, weight and physical fitness requirements prescribed by the municipal police training council pursuant to the provisions of section eight hundred forty of the executive law; and

(d) he is of good moral character.

1-a. Notwithstanding the provisions of subdivision one of this section, upon the request of a municipal commission having jurisdiction over a police force or police department or the state commissioner of general services with respect to the capital police force, and upon a showing by such municipal commission or said commissioner and a determination by the state commission that aggravated recruitment difficulties are causing a serious shortage of police officers in any such force or department and that such municipal commission or said commissioner

and all appropriate authorities are making diligent efforts, including payment of adequate compensation, to overcome such recruitment difficulties, the state commission may increase the maximum age limit for provisional and permanent appointment as a police officer in any such police force or department to thirty-five years of age for a period not exceeding two years from the date of such determination. Such increase in the maximum age may be authorized for an additional period not exceeding two years, upon a showing and a determination similar to that required hereunder for the original authorization.

1-b. Notwithstanding the provisions of any other section of the law, general, special or local, in political subdivisions maintaining a police department serving a population of one hundred fifty thousand or less, no person shall be eligible for appointment nor shall he or she be appointed to any rank above the rank of police officer unless he or she has been appointed a police officer from an eligible list established according to merit and fitness as provided by section six of article five of the constitution of the state of New York or has previously served as a member of the New York State police.

2. The provisions of this section shall not prevent the commissioner of general services or any county, city, town, village, housing authority or police district from setting more restrictive requirements of eligibility for its police officers.

3. As used in this section, the term "police officer" means a member of the capital police force or a police force, police department, or other organization of a county, city, town, village, housing authority or police district, who is responsible for the prevention and detection of crime and the enforcement of the general criminal laws of the state, but shall not include any person serving as such solely by virtue of his occupying any other office or position, nor shall such term include a sheriff, undersheriff, commissioner of police, deputy or assistant commissioner of police, chief of police, deputy or assistant chief of police or any person having an equivalent title who is appointed or employed to exercise equivalent supervisory authority.

4. (a) Any person who has received provisional or permanent appointment in the competitive class of the civil service as a police officer of the capital police force or any police force or police department of any county, city, town, village, housing authority or police district shall be eligible to resign from any police force or police department, and to be appointed as a police officer in the same or any other police force or police department without satisfying the age requirements set forth in paragraph (a) of subdivision one of this section at the time of such second or subsequent appointment, provided such second or subsequent appointment occurs within thirty days of the date of resignation.

(b) Any person who has received permanent appointment in the competitive class of the civil service as police officer of the capital police force or any police force or police department of any county, city, town, village, housing authority or police district shall be eligible to resign from any police force or police department and, subject to such civil service rules as may be applicable, shall be eligible for reinstatement in the same police force or police department to which he was eligible for transfer, without satisfying the age requirements set forth in paragraph (a) of subdivision one of this section at the time of such reinstatement, provided such reinstatement occurs within one year of the date of resignation.

5. The provisions of this section shall not apply to the police department of the city of New York or to the investigatory personnel of the office of the district attorney in any county, including any count within the city of New York.

6. The provision of this section shall not apply to any individual holding the position of deputy sheriff in Westchester county prior to July first, nineteen hundred seventy-nine upon the transfer of such individual to service in the Westchester county department of public safety services.